Clinical Judgment: A Working Definition for the Rehabilitation Professional

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How clinical judgment is used and what the rehabilitation professional understands it to mean is the focus of this article. This article was developed as a result of conversations overheard at the IARP Forensic Conference (Memphis, 2009) where the debate over the definition and role of clinical judgment appears to a continuing "hot" issue. Clinical judgment is not a "lay" term, nor is it intended to be a glib comment thrown out when an expert has no other basis for opinion. Clinical judgment is a term that has a specific meaning, has been published in peer reviewed journals, and has achieved general acceptance in the field of rehabilitation. The professional meaning of clinical judgment is predicated on valid, reliable and accepted assessment methodologies, instruments and background information about the client concerning the medical aspects of disability by a professional who has specialized knowledge, education, training and/or experience. The term "clinical judgment" is often utilized in publications, expert reports, depositions, trial testimonies and posts to various list serves. The focus of this article is to make clear that utilization of clinical judgment is appropriate with the assumed understanding of the accepted definition and the specialized knowledge involved in its utilization.

Background

Since the onset of the Daubert ruling by the U.S. Supreme Court in 1993 (Daubert v. Merrill Dow Pharmaceutical [Daubert]), one of the most talked about, written about, and debated topics is the general issue of admissibility of expert opinion. Early on, several authors warned of the coming demise of any rehabilitation testimony that did not adhere sharply to the four Daubert standards (Caragonne, 1999; Feldbaum, 1997; Mayer, 1998; & Stein, 2002). Emerging as well was the less stringent view that, in light of Kumho (Kumho Tire Company v. Carmichael [Kumho], 1999) and Joiner (Joiner v. General Electric [Joiner], 1997), the Daubert factors were not meant to strictly govern all testimony, but that other factors might apply - especially in the social sciences. Several authors (Bernstein, 1998; Field, 2002; Field, 2006; Field & Choppa, 2005; Neulicht & Barros-Bailey, 2005; Staller, 2002; and Weed & Johnson, 2006) presented a view of the Daubert issue which was much less threatening and, in fact, has resulted in being a rather relatively minor problem for rehabilitation consultants in terms of meeting the "scientific" standards. Clearly, the strict Daubert view has been on the losing side of the admissibility battle for several good reasons—a battle lost that some professionals still fail to comprehend.

Parallel to the Daubert debate has been a growing discussion of the efficacy of a reliance on the use of clinical judgment for non-science situations. In addition to Choppa et al. (2004), Downie and MacNaughton (2001) challenge the wide-spread view that all of medicine is scientific and evidenced-based. As an alternative, the authors make a case for clinical judgement, sufficiently based on technical evidence which may be neither quantifiable nor even scientific, but would certainly contain judgments based on the best information available, including scientific and/or technical information. In leading up to an appropriate understanding of the meaning of clinical judgment for the rehabilitation profession, the following considerations are presented.

1. The Rulings: A careful reading of the rulings (Daubert, 1993; Kumho, 1999; Joiner, 1997; and Paoli

Railroad Yard PCB Litigation [Paoli], 1994) clearly suggest that the criteria for deciding on the admissibility of testimony comes with latitude (discretion) on the part of the gatekeeper with leeway[1] to include other criteria which may[1] be more appropriate to the facts of the case. To assert that the four Daubert criteria should be the standard for all testimony is over-reaching and not supported by the Daubert and Kumho courts, or rulings from the lower courts.

2. The Federal Rules of Evidence: The Federal Rules of Evidence (FRE), and especially FRE 702 (see below), are the prevailing procedural and judicial guidelines for admissible testimony. In fact, the Daubert ruling was predicated largely on the FRE 702 underpinning (Daubert, 1993; also see Countiss & Deutsch, 2002).

3. Specialized and Technological Knowledge: FRE 702 identifies both "scientific" and "specialized and technological" knowledge which suggests that these two entities are different. Daubert (1993), and the four-point criteria, relates directly to "science" testimony and the scientific method. "Specialized and technical" as discussed in Kumho (1999) knowledge relates more to the social sciences which are not always subject to scientific inquiry.

4. Judgment and Common Sense: Some issues can be decided by good judgment and simple common sense (Ireland, 2009, p. 120). For example, to apply the Daubert criterion of the estimation of error rate to a life care plan makes no sense at all. An estimate of standard error is a "measure of the variability of a sampling distribution" of a previous statistic, i.e., the distribution of mean scores" (Downie & Heath, 1970, p. 160). As such, there is not much in the world of the social sciences, and rehabilitation planning, in particular, that lends itself to strict scientific statistical measures. That is, through simply good judgment and common sense some issues can be addressed by way of the specialized knowledge that professionals in the rehabilitation arena possess from education, training, certifications and other professional means (Countiss & Deutsch, 2002). This specialized knowledge is utilized in opinions and recommendations based on clinical judgment as defined and generally accepted in the field (Choppa et al., 2004).

5. Court Rulings: A review of subsequent rulings in the lower courts involving expert testimony from vocational rehabilitation consultants and life care planners (Field & Choppa, 2005; Weed & Johnson, 2006) clearly indicate that the four Daubert factors do not always strictly apply to the facts of the case. In fact, there is only one case (Kinnaman v. Ford Motor Company, 2000) the authors found in which a judge dismissed a case outright based on the Daubert factors. One issue for the Kinnaman case was that the vocational expert utilized an Internet based computer program as a foundation for her vocational opinion. The court determined that her testimony did not include "corroborating evidence that the methodology . . . is acceptable, had been tested and is generally accurate . . . and that it is used by other persons in her discipline . . . ." Since similar cases have been allowed by courts in various jurisdictions (Field & Choppa), it appears that the expert may have erred by not explaining, or being able to explain, the methodology on which the computer program was based.

Staller (2002) and Countiss and Deutsch (2002) have suggested that the two Daubert criteria that reasonably relate to the social sciences are peer review and general acceptance. Furthermore, Bernstein (1998) acknowledged that the application of the four Daubert factors to non-scientific testimony would mean excluding all non-scientific testimony.

6. The N of 1 Argument: Finally, working with people, and especially people with disabilities, results in an individual work product (Choppa & Johnson, 2008). For example, it is clear and obvious that not all people with a traumatic brain injury should be treated the same. Because of the individual's unique characteristics rehabilitation plans will reflect opinions and recommendations that are relevant only to that individual (Ripley & Weed, 2009). However, the methodology for the process of determining needs could be the same for clients with substantially varying disability related differences (Countiss & Deutsch, 2002; Weed, 2009). Several publications recounted in the Countiss and Deutsch article that provide the foundation for the value of credentials, specialized knowledge, expertise and utilization of an established methodology in developing life care plans. For example, one of the first studies of the reliability of life care planning methodology by Sutton, Deutsch, Weed, and Berens (2002) demonstrated that no significant difference was found between original life care plans and updated life care plans in two professionals' caseloads representing a wide varieties of disabilities, ages and gender. The consistent factor was that both caseloads utilized the published life care planning methodology.

Field (2008) has suggested individualized factors such as age, gender, educational background, work experience, wage earning capacity (Dorney, 2008), and the severity of the person's disability, to name just a few. At the same time, the professional associations in the field of rehabilitation and life care planning have delineated the various competencies, procedures, methodology, standards and ethical components of a responsible rehabilitation practice with an emphasis on individual planning (Field et al., 2009). Over-reliance on large sets of survey data, or placing people into categories of disability groups, such as "severe disability" or "not severe disability", fails to reasonably account for individual differences of a person's capacity to work and earn money. That is, (example of flawed rationale) the client is considered severely disabled,

therefore there is no need to evaluate the client because one only needs to know the data associated with people who are also severely disabled and those data supply the answer.

Federal Rule 702

This important rule reads as follows:

> *If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

As noted in the Kumho ruling,

> *The Daubert gatekeeping obligation applies not only to scientific testimony, but to all expert testimony." The key word in Rule 702 is the word "knowledge", not scientific, or technical, or specialized. Some knowledge is scientific, and in those cases the Daubert rule would more appropriately apply. In Kumho, the decision noted that "a trial judge determining the admissibility of . . . testimony may (italicized in the written opinion for emphasis) consider one or more of the specific Daubert factors. The emphasis on the word "may" reflects Daubert's description of the Rule 702 as a flexible one . . . the Daubert factors do not constitute a definite checklist or test. Some of those factors may be helpful in evaluating the reliability even of experienced-based expert testimony. It is only partially true that the Daubert factors must be applied in all cases (science or non-science).*[2]

Finally it has been well established that there exists both latitude and flexibility in the application of FRE 702 within the intent and meaning of the Daubert, Kumho and Joiner rulings. Burnette (2000) reaches the following conclusion on the admissibility of courtroom testimony:

> *The US Supreme Court recognized the difficulty in applying specific criteria outlined in Daubert to all types of testimony. It held the four-part test outlined in Daubert was non-exclusive and a "flexible" approach to the assessment of reliability should be applied using factors appropriate to the particular case. In certain cases, virtually none of the specific criteria outlined in the Daubert case would be applicable. In those cases, the trial judge would be given broad discretion in considering other factors which might establish reliability for the specific type of expert testimony at issue.2*

A Definition of Clinical Judgment

Readings from actual court rulings clearly suggest that all testimony does not require the scrutiny or strict application of the four Daubert factors. It is incumbent upon the expert to show that their testimony is both relevant and reliable as required by both the Daubert and Kumho rulings of the US Supreme Court. In particular, the twin tests, as suggested by Staller, are the tests of peer review and general acceptance (the old Frye standard). The definition of clinical judgment, first drafted and published by Choppa, et al., (2004), reflects the important components of FRE 702, and is consistent with the intent and meaning of the US Supreme Court cases of Daubert (1993), Joiner (1997), and Kumho (1998), all within the knowledge and skill parameters of the expert. The definition also acknowledges that rehabilitation and life care planning on behalf of a rehabilitation client must address the individual factors and issues that are germane to that particular client. In a very real sense, data and information are applied to the individual—a methodological approach of an "N of 1."

> *Clinical judgment requires that the final opinion be predicated on valid, reliable and relevant foundation information and data that are scientifically established through theory and technique building which has been tested, peer reviewed, and published, with known error rates, and is generally accepted within the professional community. In cases where any of the above factors do not apply, but other factors have greater relevance, the expert will rely on these other factors within a methodological approach, based on the expert's knowledge, skill, experience, training, or education in order to assist the trier of fact to reach a conclusion. Therefore, clinical judgment, which is the extension of the credentialing factors of the expert, encompasses all relevant factors germane to the weight of the case while discarding those factors which are not relevant, and which are allowed by the court (Choppa et al., 2004).*

In support of the above concept, Richard Countiss, an attorney, co-authored an article (Countiss & Deutsch, 2002) which was the basis for a "friend of the court" brief. Drawing upon the standards for physicians, he asserts:

> *Standards exist for the evaluation and diagnosing of the patient, choosing the procedure, applying the procedure and following-up with the patient. Yet within those standards, the physician has the ability to exercise a range of professional judgments that take into consideration individual patient differences, variations in the specific nature of the disorder, and variations in how best to apply specific procedures to individual patient differences. This same need for Rehabilitation Experts/Case Managers to exercise professional*

judgment is a component of the Life Care Planning process. However, this must be done within the context of the standards noted and a careful balance between published, accepted standards and professional judgment must be maintained. Published standards are never an excuse for failing to exercise appropriate professional judgment yet, at the same time, one can not say that they chose to exercise professional judgment as a means to simply, and lightly, dismiss accepted standards (p. 40).

Relevant Case Studies

The following five cases represent examples of actual court decisions. The first three court decisions allow testimony and the fourth represents a situation in which the expert was well qualified based on credentials, but the expected testimony was deemed unreliable and the person was excluded from testifying. The fifth case represents an attempt by an expert to offer his opinion based on a "hybrid" of two well known methodologies, but it resulted in an appeal and remand for new trial on damages. Perhaps of special interest is case #3, Hanford Nuclear Reservation, where extensive transcripts and information have been published (see below for more information). The expert overcame objections because he was able to substantiate his opinions based on experience, education, special skills and reliance on standards and methodologies generally accepted by other practicing professionals in the field of rehabilitation consulting.

Case #1: Testimony allowed although expert's credibility and plan foundation was successfully questioned and case remanded for new trial.

Francis Adeola and Grace Adeola, individually and for the use and benefit of their minor child, Fadeka Joyce Adeola v. Dr. Shawn M. Kemmerly, Dr. Michael A. Frierson, Dr. Niels J. Linschoten and Ochsner Clinic State of Louisiana Court of Appeals, First Circuit 2001 CA 1231 (Judgment Rendered: June 21, 2002)

The first case (Adeola et al., v. Dr. Shawn M. Kemmerly) involves a plaintiff who was a young child who had routine blood work as a part of a well baby checkup. The stick site became infected, but initially was diagnosed as a sprained wrist. By the time that the correct diagnosis was made, the infection had become quite serious with bone infection, compounded by other complications, "resulting in a weaker, shorter, severely scarred arm, in addition to permanent limitations on her activities and movements" (p. 3).

The appealing party, Louisiana Patient's Compensation Fund (LPCF), argued that an exorbitant award for damages was reached by the jury after a judge purportedly allowed testimony improperly without proper cross-examination of the expert's credentials in front of the jury " . . . thereby preventing the jury from having a basis for evaluating credibility . . . ." (p. 2).

At trial, the defendant requested, and the trial court granted, a Daubert/Foret hearing of the life care planning expert outside of the jury's presence. After the hearing, but before the jury returned to the courtroom, the judge commented that he thought the proffered professional was "eminently qualified as a life care planner and rehabilitation expert" p. 4). Citing Rule 702, the judge decided that the jury would benefit from hearing his testimony. However, when court resumed with the jury present, when the defendant counsel attempted to conduct voir dire, he was told by the judge that qualifications were already covered in the hearing. As an apparent way to shorten the process, the judge instructed the jury as follows, "As previously indicated, the court has instructed you as to testimony of expert witnesses because even though the court finds one to be an expert, the weight to be given is decided by you" (p. 5) and instructed the attorney not to question the expert about his background or credentials.

The defendant's attorney argued that he should have been allowed to conduct voir dire in front of the jury since it could affect the jury's view of the expert's credibility. In agreement, the appeals court commented, "Without a full cross examination of [the expert's] background, qualifications and credentials, the jury could not properly weigh [the expert's] testimony and evidence, nor properly determine the value of the evidence and testimony. The lack of a full cross examination impermissibly denied LPCF the right to fully present its case and therefore, it was denied the right to a fair trial" (p. 8). Further, "We conclude that [the expert's] testimony, the weight of his testimony, and the credibility determination regarding his credentials and qualifications as an expert witness, were of critical importance to the jury's decision. We cannot conduct a meaningful de novo review because it would involve eliminating all of [the expert's] testimony, thereby depriving plaintiff of a jury trial on the quantum issue" (p. 9). The bottom line; the judgment was vacated and remanded for a new trial.

One important aspect of the above case is that the role of the judge as a gatekeeper does not necessarily mean that the judge will prevent an expert from testifying when their credibility may be under scrutiny. Instead, the jury will be charged with assessing not only the value of the testimony but the credibility of the witness as well.

Case #2: Expert's testimony was neither speculative nor unreliable and appeal was denied.

Ruby Kay Ballance, et al. v. Wal-Mart, No. 98-1702, U. S. Court of Appeals for the 4th Circuit, 1999, U.S., App. Lexis 7663

In Ballance et al. v. Wal-Mart, 1999, while shopping at Wal-Mart, the plaintiff fell when she apparently slipped on plastic hangers left on the floor. The main focus of the appeal was whether Wal-Mart was liable for the injuries which were complicated by pre-existing conditions (asymptomatic congenital spine defects). However, part of the appeal (the only part to be addressed in this summary) was the argument by Wal-Mart that the damages related experts should have had their testimony limited under the standards as set forth by Daubert v. Merrell-Dow Pharmaceuticals decision relating to scientific expert evidence. Identified were the well known four factors: (1) The extent to which the theory has been or can be tested; (2) Whether the theory has been subjected to peer review and/or publication; (3) The technique's potential rate of error; and (4) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community.

Further, under Kumho Tire v. Carmichael, the Supreme Court extended the gatekeeping function to all expert testimony, not just "scientific" testimony. ". . . the Court explained that this discretion is not confined to application discussed in Daubert. Id. At *9-10. Rather the district court has 'considerable leeway' to examine any number of factors in determining whether expert testimony is reliable; these factors may included, but are not limited to, the Daubert factors" (p. 4). In the case of Kumho Tire, the district court was correct in the decision to exclude the testimony of the tire expert as unreliable.

In the Ballance case, the expert offered two alternative life care plans: One where treatment successfully stabilized the patient's medical condition and the other in the event the patient's condition declined. Wal-Mart did have their own expert witness to counterclaim come of the plaintiff's expert's opinions.

Wal-Mart argued that one of the medical experts, on which much of the life care plan was based, offered opinions which were speculative and unreliable. Some future care and conditions might be "possible" and Wal-Mart argued the testimony would have been limited. However, Wal-Mart's expert testified that (for an example) an anticipated surgery was 80% likely to be successful, but agreed it could also worsen the condition (including loss of bowel and bladder function and the ability to walk).

Turning to the life care plan, Wal-Mart argued that future care plans are contingent upon future events and choices and therefore are unreliable and speculative. Additionally, they argued that under Federal Rules of Evidence 403,[3] the life care plan expert's testimony should have been limited. However, the district court was found to have exercised proper discretion and the appeal was rejected. First, this case underscores the value of separating probable vs. possible future care. In the original format of the life care plan literature (Deutsch & Raffa, 1981, Damages in Tort Action) the authors included a page for listing "Potential Complications" for which no prediction of duration or frequency could be determined. Secondly, opinions based on clinical judgment relating to two possible scenarios were accepted as reasonable and reliable.

Case #3: Expert did possess specialized skills and knowledge and relied upon accepted methodologies and was allowed to testify.

In RE Hanford Nuclear Reservation, No. CY-91-3015-WFM, United States District Court for the Eastern District of Washington at Spokane (January 21, 2005). [Also see Choppa, T., Field T. & Johnson, C. (2005). The Daubert challenge: From case referral to trial. Elliott & Fitzpatrick: Athens, GA. for extensive transcripts and notes regarding this case.]

In this case, the Daubert related hearings took prior to trial. A rather extensive challenge was launched with examples as follows (1) the expert is not qualified to offer opinions regarding radiation, (2) the expert relied exclusively on plaintiffs' experts, (3) expert "worked here as an information coordinator and scrivener, not medical or rehabilitation expert" (Choppa, Field & Johnson, p. 42), (4) portions of the life care plan were not based on "more probably than not" concept, (5) past cost analysis was simply a compilation as determined by plaintiffs' experts, and (6) the expert's opinion included personal observation of the plaintiffs under the guise of an expert opinion. In addition to the rebuttal by a plaintiff's attorney, the expert offered his own report with extensive support for how a life care planner conducts an evaluation and publishes an opinion. Topic headings included experience, ethics, associations, existing standards, and specific responses to the defendant's motion.

The court's ruling was that the expert would be able to testify regarding the data in the life care plan, although unless medical testimony supported surgery, this item should be removed. Additionally, the expert could testify about his interactions with the plaintiff but may not offer an expert opinion as to the plaintiff's credibility.

Case #4: Expert for the plaintiff was deemed well qualified, but opinions were not consistent with foundation testimony and opinions and she was excluded.

Cindy Taylor, Individually and as Guardian Ad Litem for Brody Patrick Wright and Arthur M. Taylor vs. Speedway Motorsports Inc. and Charlotte Motor Speedway, LLC, doing business as Lowe's Motor Speedway; Tindal Corporation, formerly Tindall concrete Products, Inc and Anti-Hydro International , N.C., Mecklenburg County Super. Ct.: 01-CVS-12107

This case relates to a successful motion to exclude a life care planning expert who was expected to testify on behalf of the plaintiff. The judge embellished on his ruling on March 7, 2003 with following commentary.

> *"... the Court notes that the witness [for the plaintiff] wishes to express an opinion or numerous opinions without the proper foundation, in the opinion of the Court, having been laid for the expression of said opinions. The Court finds that these opinions are entirely speculative, for example, including, but not limited to, the following examples: Expressing her opinions as to how the plaintiffs would be seen and treated by various health care providers in years to come and the cost of that, without evidence to substantiate that or lay a proper foundation for that. Secondly, expressing opinions as to the medical equipment of the plaintiffs 15 or more years in the future, when the treating physicians have not indicated in their testimony any substantiation for this opinion. The record is devoid of any such evidence, in the opinion of the Court. Third, that she expresses opinions as to what surgery would be needed and the frequency of surgery for as far out as ten years from now when there is no medical evidence to support that. The Court finds, in its discretion, that the proffered testimony is unreliable and is not relevant therefore. I am basing this ruling in part on Kumho Tire vs. Carmichael - I do not have the U.S. citation, it's 119 Supreme Court 1167;Daubert vs. Merrell Dow Pharmaceuticals, 509 U.S. 579; State vs. Bullard, 312 NC 129; State vs. Spencer, 119 NC Appellate 662. Further, the Court finds that the proffered testimony would not be helpful and will not assist the jury in understanding the evidence or determining the facts in issue. Further, the Court finds that for all of the above reasons the probative value of such testimony is substantially outweighed by the danger of unfair prejudice, misleading the jury, and waste of time. The Court further notes and finds as a fact that there has been no peer review of the testimony or of the anticipated testimony of this witness. There is no publication to which reference has been made in any testimony that would substantiate this. There has been no offer of visual aids to assist the jury. And for all of these reasons the testimony of [the expert witness] is excluded" (pp. 33-34).*

The wording by the judge encompasses several areas of interest. First, the qualifications of the expert were not in dispute, just the expected testimony. Second, Daubert and Kumho Tire cases were referenced as justification for the judge's "gate keeping" discretion which disallowed testimony rather than giving the jury the responsibility to determine the credibility of witness. Third, another topic which the judge asserted in his commentary was related to Federal Rules of Evidence 403 which indicated that the testimony was, in essence, a waste of the court's time.

A discussion ensued with regard to some deposition testimony which was read where conflicting opinions seemingly were expressed. One example was when the judge referenced the testimony of the treating psychologist stating, "... and it's [the opinions of the life care planner] contrary to what I thought was an outstanding witness, Dr. Owens" (p. 23) and whose recommendations the life care planner apparently ignored or did not accept.

Case #5: Expert testified at trial that the client was 50 to 60% disabled by combing two well known methodologies into a hybrid approach, resulting in an appeal and remand for new trial on damages (for this issues and others).

Elcock vs. K-Mart Corp. (1998, US Ct of Appeals, 3rd Cir, No. 98-7472)

There were several issues discussed in this appeal, but a central theme was related to the expert's "thin" vocational rehabilitation education and knowledge and his unique application of two existing disability determination methodologies. The court allowed the expert to testify without allowing a Daubert type hearing. K-Mart asserted that the expert provided unreliable testimony on which, in part, the jury relied when determining the damage award. The court of appeals agreed.

The expert opined that Elcock was between 50 and 60 percent vocationally disabled and that this disability was permanent. When pressed for an explanation of the methodology used, he testified:

> *I use a combination of the procedure recommended by Fields [sic] which is to look at level of preinjury access to the labor market and post injury access and the percentage and the difference between those percentages Fields says is the loss of jobs or the lost percentage. I also looked at which is what I normally do at the procedure recommended by Anthony Gamboa and he suggests that you look at all the factors involved in the client's analysis, injury, test results, psychological results, the client's statements, and so on, and then you as the clini-*

> *cian must make a, you as a vocational expert must make an estimate. And so what I do is I use Fields analysis as a starting point and then I revert to Gamboa to depart from Fields [sic] to come up with an estimate (p. 20).*

The appeals court countered with: "However, we are inclined to view [the expert's] admittedly novel synthesis of the two methodologies as nothing more than a hodgepodge of the Fields and Gamboa approaches, permitting [the expert] to offer a subjective judgment about the extent of Elcock's vocational disability in the guise of a reliable expert opinion" (p. 21). It is valuable to note that: "K-Mart does not dispute that the Fields[sic] and Gamboa approaches are accepted methodologies in the vocational rehabilitation field; what it does challenge is [expert's] combination method" (p. 20).

The above case summarizes most issues relevant to this paper. The court needed to determine if the expert was qualified to testify regarding vocational rehabilitation by education, experience, knowledge, training and skill and the testimony would assist the jury in reaching a decision. There is an extensive review of these factors in the appeals court decision. Further, the expert was allowed to express opinions based in part on clinical judgment, which was termed in the appeal as the expert's "ipse dixit statement" (p. 18) or because he said it, therefore it is so. However, the appeals court rejected the expert's opinions based in part on the lack of evidence that the hybrid concept was generally accepted and the case was remanded for a new trial on damages.

Conclusion

In conclusion, the issues surrounding admissibility of testimony, in view of the more scientific criteria of Daubert and the broader standard established by Kumho and Joiner, have been largely settled. An emphasis on the appropriate methodology or methodologies is in order. Table 1 summarizes issues related to developing an opinion utilizing clinical judgment. Clearly, as noted in the Table, given the fact that persons require individual attention through evaluation and assessment, planning, resource development, and the reliance on foundation data and information, a reasonable course is to apply clinical judgment skills to problem-solving consistent with all the facts of the case. Objective data (i.e., test scores, computer analyses, consultants' reports, etc.) are required "to provide a concrete basis for the making of some decisions, and to make somewhat less intuitive some of the clinical judgments which have to be made when objective data are lacking" (Super & Crites, 1949, p. 596). Furthermore, courts rulings underscore that testimony must be reliable and based on generally accepted methodology. The days of opinions founded simply on one's experience or offering some unique obscure, esoteric theory are probably over. In the final analysis, however, in instances of opinion development with most rehabilitation cases, the rehabilitation and life care planning consultant must rely on a methodology that includes clinical judgment.

Author Notes

[1] These two words were italicized in the Kumho ruling for emphasis.

[2] This brief section on FRE 702 has been abstracted from Field and Choppa (2005, p. 3-4).

[3] Editor's note: Rule 403 refers to "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Source: http://www.law.cornell.edu/rules/fre/rules.htm#Rule403

Table 1
Clinical Judgment Parameters

- ✓ Are opinions based on relevant information, facts and data?
- ✓ Do opinions correctly utilize widely accepted and/or peer reviewed methodology?
- ✓ Are opinions for medical care founded upon clinical practice guideline and/or outcome studies?
- ✓ Are opinions consistent with relevant standards of practice?
- ✓ Are statistical studies used in support of opinions which are individual and client/evaluee centered (which is appropriate), or are opinions based primarily or solely upon statistical studies (which is inappropriate)?
- ✓ If testing is pertinent, are the tests reliable, reliable and valid?
- ✓ Are opinions objective, unbiased, ethical and professional?

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